Supreme Court, U.S.
FILED
JAN 22 2002

No. 01-903

In The

Supreme Court of the United States

PATRICIA A. WESTON, on behalf of herself and all others similarly situated,

Petitioner,

v.

AMERIBANK, a state savings bank,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

JOHN J. BURSCH
Counsel of Record
WILLIAM K. HOLMES
MOLLY E. MCFARLANE
WARNER NORCROSS & JUDD LLP
900 Fifth Third Center
111 Lyon Street, N.W.
Grand Rapids, MI 49503
(616) 752-2000

RONALD J. VANDER VEEN
CUNNINGHAM DALMAN, P.C.
321 Settlers Road
Holland, MI 49423
(616) 392-1821

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

22(8

QUESTION PRESENTED

Does the filing of a class action lawsuit toll the statute of limitations for a class member's individual claim, when that claim is not and could not be asserted by the class representatives?

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent AmeriBank was a Michigan savings bank that was a wholly owned subsidiary of Ottawa Financial Corporation, a publicly traded company. Effective December 8, 2000, AmeriBank was acquired and merged into Fifth Third Bank of Indiana, a wholly owned subsidiary of Fifth Third Bancorp, which is also publicly traded.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

I. STATEMENT OF FACTS 1

II. PROCEEDINGS BELOW 3

REASONS FOR DENYING THE PETITION 5

I. BECAUSE THIS CASE PRESENTS AN ISSUE OF FIRST IMPRESSION IN THE COURTS OF APPEALS, IT IS ILL-SUITED FOR SUPREME COURT REVIEW 6

A. The Courts of Appeals Are Not in Conflict with Each Other or With This Court 6

B. An Issue of Immediate Public Importance Is Not Presented 8

C. The Issue Presented Is Not Mature 9

II. THE SECOND CIRCUIT'S DECISION IN *CULLEN* IS IMMATERIAL TO THE PETITION 10

III. THIS COURT'S DECISIONS IN *AMERICAN PIPE* AND *CROWN, CORK* AFFIRM THE CORRECTNESS OF THE SIXTH CIRCUIT BELOW 12

CONCLUSION 17

TABLE OF AUTHORITIES

Page

Federal Cases

American Pipe & Constr. Co. v. Utah,
414 U.S. 538 (1974) ..... *passim*

Catholic Social Servs., Inc. v. INS,
232 F.3d 1139 (9th Cir. 2000) 4, 8

Crown, Cork & Seal Co. v. Parker,
462 U.S. 345 (1983) ..... *passim*

Cullen v. Margiotta,
811 F.2d 698 (2d Cir. 1987) ..... *passim*

Durden v. California,
121 S. Ct. 1183 (2001) 9

Korwek v. Hunt,
827 F.2d 874 (2d Cir. 1987) 11

Lackey v. Texas,
514 U.S. 1045, 115 S. Ct. 1421 (1995) 9

McCray v. New York,
461 U.S. 961 (1983) 9

Northwest Airlines, Inc. v. Duncan,
531 U.S. 1058, 121 S. Ct. 650 (2000) 6, 10

Rice v. Sioux City Mem'l Park Cemetery, Inc.,
349 U.S. 70 (1955) 8

Wade v. Danek Medical, Inc.,
182 F.3d 281 (4th Cir. 1999) 3

Statutes and Rules

15 U.S.C. § 1640 ..... 2, 3

Sup. Ct. R. 29.6 ii

BRIEF FOR THE RESPONDENT IN OPPOSITION

Petitioner, as putative class representative, seeks to resurrect a Truth in Lending Act ("TILA") claim against Respondent filed after the limitations period expired. Petitioner claims the limitations period was tolled by a prior certified class action lawsuit against Respondent in which Petitioner was a class member. The Sixth Circuit ruled against Petitioner and upheld the trial court's dismissal of the TILA claim, because a TILA claim was not, and could not have been, made by the class representatives in the prior lawsuit, making the tolling doctrine inapplicable to Petitioner's TILA claim.

Petitioner asserts a conflict between the Sixth Circuit's decision and decisions of this Court and the Second Circuit. But there is no conflict. The question the Sixth Circuit decided has never been presented to this Court or any federal court until now. The unique, fact-specific nature of this case, and the Sixth Circuit's narrow holding based on those unique facts, make this case particularly ill-suited for Supreme Court review.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS.

On April 1, 1998, Petitioner closed a mortgage loan with Respondent. Pet. App. a3. As part of the closing, Respondent charged Petitioner a $350 document preparation fee. *Id.* Petitioner now claims, in a class action lawsuit filed September 10, 1999, that the document

preparation fee violates the TILA. *Id.* at a3-a4. It is undisputed that the one-year statute of limitations for TILA claims in 15 U.S.C. § 1640(e) applies to this case, and that the limitations period bars Petitioner's complaint unless the statute of limitations is tolled. *Id.* at a5.

Petitioner bases her tolling argument on a class action complaint filed by Paul and Theresa Dressel against Respondent in Michigan state court on December 21, 1998. Pet. App. a3. In that case, the Dressels alleged that Respondent's document preparation fee violated Michigan's usury law and Michigan's statutory prohibition against the unauthorized practice of law. *Id.* The Dressels did not allege a TILA violation. *Id.* The state trial court certified the Dressels' case as a class action on March 22, 1999. *Id.* It then dismissed the case on July 2, 1999, holding that Respondent's document preparation fee did not violate Michigan usury law and did not constitute the unauthorized practice of law. *Id.*

The Dressels moved for reconsideration and sought leave to amend their complaint to include a TILA claim. Pet. App. a3. The state court denied the motion on September 3, 1999, holding that the Dressels' TILA claim was itself barred by the one-year limitations period because the Dressels filed their complaint on December 21, 1998, more than thirteen months after they closed on their November 17, 1997, loan. *Id.* at a3-a4. The attorney who represented the Dressels in the first class action also represents Petitioner here. *Id.* at a4.

II. PROCEEDINGS BELOW.

In this case, Respondent moved in the district court to dismiss Petitioner's complaint on the basis that the one-year statute of limitations in 15 U.S.C. § 1640(e) barred the TILA claim. *Id.* at a4. The district court first held that Petitioner's claim could not proceed as a class action under any circumstances, because tolling does not apply to successor class actions. Pet. App. b12.

The district court then held that the limitations period for Petitioner's individual claim was not tolled by the Dressels' class action lawsuit. The court first noted that "[h]ad [Petitioner] filed this action in a Michigan state court, little doubt exists that her TILA claim would be subject to dismissal." Pet. App. b13. That was because Petitioner's "TILA claim was not asserted in the prior class action," and in fact could not be brought (because the limitations period had expired). Pet. App. b14.

The court next concluded Petitioner's federal claim was barred by *res judicata*, Pet. App. b15-16, and that Petitioner's tolling theory was inapplicable. In reaching this conclusion, the district court stated that the "strong aroma of forum shopping" had caused it "to reject application of a case on which plaintiff heavily relies, *Cullen v. Margiotta*, 811 F.2d 698 (2d Cir. 1987)." Pet. App. b17. The court noted that "unlike *Cullen*'s interpretation of New York law, Michigan courts do not allow tolling where the new case involves different legal theories than those pled in the first case," *id.* at b18, and the court was not inclined to adopt a cross-jurisdictional tolling rule. *Id.* at b17 (citing *Wade v. Danek Medical, Inc.*, 182 F.3d 281 (4th Cir. 1999)). The court also dismissed *Cullen* as a case "of

questionable authority even in the Second Circuit where it was decided." *Id.* at b18.[1]

On appeal, the Sixth Circuit affirmed. For purposes of this Petition, most important are the two issues the Sixth Circuit did *not* address. First, the Sixth Circuit did not discuss the availability of tolling when a class member seeks to file a second class action instead of an individual action. Second, the Sixth Circuit did not discuss the availability of tolling when the claim in the second-filed case was available to the class representatives in the first case, but simply not pled in the complaint. These two irrelevant issues are the ones addressed by Petitioner's cited cases, *Catholic Social Services, Inc. v. INS*, 232 F.3d 1139 (9th Cir. 2000) (en banc), and *Cullen*, respectively. What the Sixth Circuit *did* address was the fact that the Dressels could not have brought a TILA claim in their class action even if they wanted to do so. The Sixth Circuit's holding was thus based *solely* on the unique fact that the TILA claim was not, and could not have been, asserted by the Dressel class representatives:

> Under *American Pipe*[2], the statute of limitations for putative class members of the original class is tolled only for substantive claims that were raised, or could have been raised, in the initial complaint. . . . The Dressel case did not toll the TILA's one-year statute of limitations for [Petitioner]'s TILA claim because the Dressels *did not*

---

[1] Petitioner states that the district court did not hold her individual claim time-barred. Pet. at 6. This is incorrect. In discussing Petitioner's individual claim, the district court specifically rejects her tolling argument. Pet. App. at b17-18.

[2] *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974).

> assert a TILA claim and the Dressels *could not* have made a TILA claim in their initial complaint because their complaint was filed after the TILA's one-year statute of limitations had run. Therefore, the district court did not err when it granted summary judgment for [Respondent].

Pet. App. a7 (emphasis added).

REASONS FOR DENYING THE PETITION

No compelling ground exists for granting certiorari in this case. The issue presented is whether the filing of a class action lawsuit tolls the statute of limitations for a class member's individual claim, when that claim is not, and could not be, asserted by the class representatives. The Sixth Circuit recognized the purpose of the class action tolling doctrine – to avoid unnecessary filings of repetitious lawsuits by class members – and concluded, correctly, that such purpose was not served by allowing a party to belatedly file a claim that was not, and could not have been, made in the first lawsuit.

Petitioner mischaracterizes the Sixth Circuit's decision in attempting to manufacture a split between the Sixth Circuit and the Second Circuit, and between the Sixth Circuit and this Court. The Sixth Circuit did not "reject[ ] the district court's acknowledgment that 'the filing of a class complaint tolls the statute of limitations for absent class members, both for claims actually alleged and those growing out of the same conduct, transaction, and occurrence.' " Pet. at 8. The court held only that the tolling doctrine is inapplicable where the claim asserted

in the second lawsuit was not, and could not have been, asserted in the first lawsuit.

The Sixth Circuit's conclusion regarding tolling was grounded in the very narrow factual situation presented by this unique case. As a result, when presented with the broader question of tolling involving an *available* claim not pled in a prior class action lawsuit, the court may or may not reach the same conclusion as the Second Circuit. That point strips Petitioner's asserted conflict of all relevance to the question of certiorari. What the Sixth Circuit would do in the future when presented with Petitioner's hypothetical issue is irrelevant to the outcome of this case.

I. BECAUSE THIS CASE PRESENTS AN ISSUE OF FIRST IMPRESSION IN THE COURTS OF APPEALS, IT IS ILL-SUITED FOR SUPREME COURT REVIEW.

No other court of appeals has considered whether the filing of an initial class action lawsuit can toll the statute of limitations for a claim asserted in a second class action lawsuit, where the claim in the second suit was not, and could not have been, raised in the first suit. The unique facts of this case make it inappropriate for Supreme Court review for three reasons.

A. The Courts of Appeals Are Not in Conflict with Each Other or With This Court.

A core ground for granting certiorari is a conflict among the courts of appeals. *See Northwest Airlines, Inc. v.*

Duncan, 531 U.S. 1058, 121 S. Ct. 650, 650 (2000) (O'Connor, J., dissenting from denial of certiorari) ("The Courts of Appeals . . . have taken directly conflicting positions on this question.") That is the sole ground on which Petitioner bases her Petition. But the issue presented here is one of first impression in the courts of appeals (or any other federal court), and there is thus no conflict among them.

The Sixth Circuit ruled that a certified class action lawsuit cannot toll the statute of limitations for a claim asserted in a second class action, where the subsequent claim was not, and could not have been, raised in the first class action. No other federal court has addressed this question.

While the Second Circuit in *Cullen* noted that a claim in a second-filed lawsuit need not necessarily be identical to a claim in a first-filed class action for the tolling doctrine to apply, 811 F.2d at 721, the court did *not* consider the situation here, where the claim in the second-filed lawsuit *could not* have been raised in the first-filed lawsuit. Just the opposite, two of the *Cullen* class representatives were also the class representatives in the first-filed suit; those plaintiffs obviously could have raised the same claims in either lawsuit. Thus, because *Cullen* does not even address the issue presented here, the Sixth Circuit's decision could not have created a conflict with it.

Likewise, the Sixth Circuit's decision is not inconsistent with this Court's decisions in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983). Those cases

hold only that the commencement of a class action suit tolls the applicable statute of limitations for all class members who make timely motions to intervene upon denial of certification, and for all class members who bring individual actions after class certification is denied. The decisions do not discuss whether the second action can be certified as a class (the issue addressed in *Catholic Social Services*), whether the claims in the second action must have been presented in the first action (the issue addressed in *Cullen*), or whether the claims in the second action must have been available to the class representatives in the first action (the issue presented here). The Sixth Circuit's decision therefore could not have created a conflict with this Court either.

B. An Issue of Immediate Public Importance Is Not Presented.

A second core ground for granting certiorari is the public importance the issue presents. *See Rice v. Sioux City Mem'l Park Cemetery, Inc.*, 349 U.S. 70, 79 (1955) ("[T]he question was of importance merely to the litigants and did not present an issue of immediate public significance."). In the circumstances presented here, however, the unique factual nature of this case evidences its lack of immediate public importance. Petitioner does not argue otherwise.

The result in the Sixth Circuit turned on the exceptional fact that Petitioner's claim could not have been asserted by her class representatives in the first class action suit. This is a unique situation. In fact, from 1974, the year this Court first articulated the class action tolling

doctrine in *American Pipe*, up to the date of this filing, no reported federal court decision has ever addressed the issue decided by the Sixth Circuit. Certainly, if the narrow tolling question this case presents raised important and far-reaching issues, it would have been before the courts of appeals, or at least before district courts, numerous times during those 25 years. Not a single reported decision indicates that this issue has surfaced before.

Far from presenting an issue of immediate public importance, the Sixth Circuit's holding is a narrow one, of interest only to this case. The decision neither changes the law nor modifies existing precedent. Review by this Court is therefore unwarranted.

C. The Issue Presented Is Not Mature.

This Court often practices judicial restraint, waiting until an issue matures through study and interpretation by a number of lower courts before it undertakes review of the issue. *See Durden v. California*, 121 S. Ct. 1183, 1183 (2001) (Souter, J., dissenting from denial of certiorari) ("[R]ulings by other courts . . . would be valuable to us in any examination of the issue we might ultimately give it."); *Lackey v. Texas*, 514 U.S. 1045, 115 S. Ct. 1421, 1422 (1995) (Stevens, J., respecting denial of certiorari) ("[A] denial of certiorari on a novel issue will permit the state and federal courts to 'serve as laboratories in which the issue receives further study before it is addressed by this Court.' " (quoting *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of certiorari))).

Here, the Court's practice of judicial restraint would be wisely exercised. This case presents an issue of first impression. A three-judge panel decided the case in a unanimous decision. Petitioner did not seek reconsideration or an *en banc* hearing. The issue presented has not been studied by any other federal court, let alone several. The issue presented is therefore not mature and is ill-suited for Supreme Court review. *Cf. Northwest Airlines*, 121 S. Ct. at 651 (O'Connor, J., dissenting from denial of certiorari) ("The legal issue is . . . well suited for resolution by this Court. The two leading cases . . . are both the product of en banc consideration. They have fully explained the relevant considerations, including the language and history of the ADA and its pre-emption clause, as well as the policies supporting the possible interpretations. . . . "). This Court should allow this issue of first impression to mature through further consideration in the laboratories of the lower courts, if in fact the issue is of sufficient importance to even reach that stage.

II. THE SECOND CIRCUIT'S DECISION IN *CULLEN* IS IMMATERIAL TO THE PETITION.

As explained, the Sixth Circuit's decision below does not conflict with the Second Circuit's statements in *Cullen* because the two cases do not deal with the same issue. Whereas the Sixth Circuit was faced with the tolling of a claim that was not, and could not be, brought in the first-filed class action lawsuit, the Second Circuit was faced with claims that the plaintiffs could have brought in the first-filed class action lawsuit (since two of the class representative plaintiffs were also class representatives in

the first-filed case), but which the plaintiffs chose not to plead. The Second Circuit was not faced with the issue presented here. *See Korwek v. Hunt*, 827 F.2d 874, 877 (2d Cir. 1987) (noting that *Cullen* was based "on an analysis of a *single* issue – whether the state action was sufficiently related to the federal action to warrant invocation of *American Pipe*").

The Second Circuit's discussion in *Cullen* is also distinguishable for an additional reason that further demonstrates the unique and fact-specific nature of Petitioner's case, and the narrowness of the Sixth Circuit's holding.

The first-filed class action lawsuit in *Cullen* was never certified, as the class in the Dressels' lawsuit was. The *Cullen* court relied on that absence of certification in concluding the second-filed claims had been tolled, reasoning that a class member is not bound by a class representative's choice of legal claims until certification:

> Not until a class is certified "does a class member have any duty to take note of the suit or to exercise any responsibility with respect to it. . . . " *An absent putative class member in an action where a class was never certified thus is not legally bound* either *by the named plaintiffs' choice of legal claims* or by a dismissal for failure to allege sufficient facts to state a cause of action, even if that dismissal would have res judicata effect against the named plaintiffs.

811 F.2d at 719 (quoting *American Pipe*, 414 U.S. at 552) (emphasis added). In contrast, the Dressels' lawsuit *was* certified as a class action (and then dismissed). Pet. App. a3. In the Second Circuit's words, Petitioner was thus "legally bound . . . by the named plaintiffs' choice of legal

claims," which did *not* include a TILA claim. That reasoning does not conflict with but rather supports the result the Sixth Circuit reached in this case, and it further illustrates the underlying factual differences that distinguish this case from *Cullen*.

III. THIS COURT'S DECISIONS IN *AMERICAN PIPE* AND *CROWN, CORK* AFFIRM THE CORRECTNESS OF THE SIXTH CIRCUIT BELOW.

The Sixth Circuit correctly concluded Petitioner's TILA claim was not tolled by the Dressels' class action because the TILA claim was not, and could not have been, raised by the Dressels, the class representatives. The Sixth Circuit's conclusion is consistent with the two cases on which it relied, i.e., this Court's decisions in *American Pipe* and *Crown, Cork*.

American Pipe involved a civil antitrust action where the district court, after denying class certification, denied as untimely purported class members' various motions to intervene. The Ninth Circuit reversed, and this Court agreed, ruling that the motions to intervene were not time-barred. This Court reasoned that if the filing of a class action did not toll the statute of limitations, potential class members would file motions to intervene or to join to protect themselves in case certification was denied. 414 U.S. at 553. That rush to the courthouse would frustrate the principal purposes of the class action procedure, which are to promote efficiency and economy of litigation. *Id.* Thus, this Court held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class

who would have been parties had the suit been permitted to continue as a class action." *Id.* at 554. To some extent, the holding was confined to the facts before the Court, as the opinion indicates it applies "at least where class action status has been denied *solely because of failure to demonstrate that 'the class is so numerous that joinder of all members is impracticable.'* " *Id.* at 552-53 (emphasis added).

Nine years later, in *Crown, Cork,* this Court expanded slightly on the *American Pipe* holding, concluding that a class action filing tolls the statute of limitations as to all asserted class members, whether they choose to intervene *or* file "individual actions" following the denial of certification. *Crown, Cork,* 462 U.S. at 346. This Court noted that while "[l]imitation periods are intended to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights, . . . these ends are met when a class action is commenced. Class members who do not file suit while the class action is pending cannot be accused of sleeping on their rights." *Id.* at 352 (citations omitted). The key to this model for class action procedure was the ability of class members to rely on the class representatives to present the class claims. *Id.* at 352-53 ("Rule 23 both permits and encourages class members to rely on the named plaintiffs to press their claims."); *id.* at 350 ("unless the statute of limitations was tolled by the filing of the class action, class members would not be able to rely on the existence of the suit to protect their rights."). This Court thus concluded, as it did in *American Pipe,* that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been

parties had the suit been permitted to continue as a class action." *Id.* at 353-54 (quoting *American Pipe*, 414 U.S. at 554).

In both *American Pipe* and *Crown, Cork*, various members of this Court warned of the danger in allowing the tolling doctrine to be expanded too broadly. In *American Pipe*, Justice Blackmun wrote in a concurrence that the decision "must not be regarded as encouragement to lawyers in a case of this kind to frame their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights." 414 U.S. at 561 (Blackmun, J., concurring). Similarly in *Crown, Cork*, Justice Powell's concurrence, joined by Justices Rehnquist and O'Connor, confirms "[t]he tolling rule of *American Pipe* is a generous one, inviting abuse. . . . The rule should not be read . . . as leaving a plaintiff free to raise different or peripheral claims following denial of class status." 462 U.S. at 354 (Powell, J., concurring).

The Sixth Circuit in its analysis started with a reiteration of this Court's pronouncements in *American Pipe* and *Crown, Cork*. Pet. App. a5-a6. The court then held Petitioner's TILA claim barred because it was "separate and distinct" from the state law claims the Dressels raised:

> Under *American Pipe*, the statute of limitations for putative class members of the original class is tolled only for substantive claims that were raised, or could have been raised, in the initial complaint. . . . The Dressel case did not toll the TILA's one-year statute of limitations for [Petitioner]'s TILA claim because the Dressels *did not*

> assert a TILA claim and the Dressels *could not* have made a TILA claim. . . .

Pet. App. a7 (emphasis added).

The Sixth Circuit's holding comports with *American Pipe* and *Crown, Cork*. Those cases were designed to encourage class members to rely on named plaintiffs to pursue class claims, instead of filing repetitious individual claims. *Crown, Cork*, 462 U.S. at 350, 352-53. But here, Petitioner could not have been relying on the Dressels to protect and assert her TILA claim. The Dressels did not make a TILA claim, and indeed, *had* no TILA claim. In this situation, there is no policy of efficiency or economy that militates against the filing of a second lawsuit, or against the filing of a motion to intervene in the first suit. Just the opposite, judicial efficiency and economy dictate that the excluded TILA claim be brought immediately, rather than years after the fact, after a dismissal on the merits and in a different forum. Thus, a potential class member like Petitioner, who was or should have been aware the Dressels had not pled a TILA claim,[3] sleeps on her rights in failing to bring a second action or moving to intervene. Stated another way, the policy rationale underlying this Court's decisions in both *American Pipe* and *Crown, Cork* – a class member's ability to rely on the class representatives to assert the member's claims – is not present when those claims are not and cannot be asserted by the class representatives.

---

[3] Because Petitioner and the Dressels share the same attorney, Petitioner cannot be heard to argue that she was unaware the Dressels failed to file a TILA claim as part of their class action.

Petitioner raises a red herring in discussing "the analysis that courts are to adopt when a second plaintiff raises claims that were not made in the initial suit." Pet. at 13-14. As a preliminary matter, Petitioner does not rely on the majority opinions in *American Pipe* and *Crown, Cork*, but rather on the concurring opinions. More fundamentally, Petitioner's analysis does not acknowledge the unique factual scenario this case presents, where the second-filed claim could never have been pled by the class representatives in the initial class action lawsuit. Petitioner's discussion is therefore entirely irrelevant to the issue this case actually presents. The same is true when Petitioner discusses the Second Circuit's decision in *Cullen* (Pet. at 15-16), which similarly did not raise the issue of a second-filed claim that was not, and could not have been, raised in a first-filed class action.

In sum, the Sixth Circuit correctly concluded the class action tolling doctrine does not apply to a class member's claims that were not, and could not be, asserted in the first-filed class action. No decision of this Court is in conflict with that conclusion, and no other court of appeals has even studied the question; it is an issue of first impression in any federal court. The Sixth Circuit's narrow holding is intrinsically intertwined with the unique factual situation presented here, evidencing the case's lack of importance. Accordingly, the Petition should be denied.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JOHN J. BURSCH
Counsel of Record
WILLIAM K. HOLMES
MOLLY E. MCFARLANE
WARNER NORCROSS & JUDD LLP
900 Fifth Third Center
111 Lyon Street, N.W.
Grand Rapids, MI 49503
(616) 752-2000

RONALD J. VANDER VEEN
CUNNINGHAM DALMAN, P.C.
321 Settlers Road
Holland, MI 49423
(616) 392-1821

January 2002